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IN THE
# SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1993

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| CURTIS RAY WARD | § | PETITIONER |
| | § | |
| VS. | § | |
| | § | |
| THE STATE OF TEXAS | § | RESPONDENT |

**Petition For Writ Of Certiorari To The Court Of Appeals For The First Supreme Judicial District Of Texas At Houston, Texas**


TURNER & GOTTLIEB

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# QUESTIONS PRESENTED

1. Whether assessment of a tax, pursuant to Texas Controlled Substance Tax Act, TEX. TAX CODE ANN. § 159.001 et seq. (Vernon Supp. 1993), is considered punishment for Fifth Amendment, Double Jeopardy Clause Purposes.

2. Whether assessment and partial payment of a $109,546.60 tax assessed pursuant to Texas Controlled Substance Tax Act, TEX. TAX CODE ANN. § 159.001 et seq. (Vernon Supp. 1993), bars any subsequent prosecution for possession of the marijuana that constituted the basis for imposition of the tax.

3. Whether a civil forfeiture, pursuant to TEX. CODE CRIM. PROC. ANN. § 59 et seq (Vernon Supp. 1994), is considered punishment for Fifth Amendment, Double Jeopardy Clause Purposes.

4. Whether a civil forfeiture judgement, pursuant to TEX. CODE CRIM. PROC. ANN § 59 et seq (Vernon Supp. 1994), bars any subsequent prosecution for possession of the marijuana that constituted the basis for imposition of the tax.

# IDENTIFICATION OF PARTIES

The parties to this petition for writ of certiorari are:

1. Curtis Ray Ward, Petitioner.

2. The State of Texas, Respondent.

3. Robert G. Turner, attorney for Petitioner.

4. Micheal R. Little, in his official capacity as District Attorney for Chambers County, Texas, for Respondent.

5. Dan Morales, in his official capacity as attorney general of Texas, for Respondent.

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# TO THE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

**COMES NOW CURTIS RAY WARD**, petitioner herein, by and through his attorney, **ROBERT G. TURNER**, and pursuant to Rule 12, files this petition for writ of certiorari to the Court of Appeals for the First District of Texas and in support thereof, would show the Court:

## JURISDICTION

This is a petition for writ of certiorari to the Court of Appeals for the First District of Texas. The Texas Court of Criminal Appeals denied discretionary review on May 18, 1994.[1]

This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

## RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The constitutional and statutory provisions relevant to this petition are the Double Jeopardy Clause of the Fifth Amendment, U.S.

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[1]The Texas Court of Criminal Appeals is the highest Court in Texas with jurisdiction on criminal matters. TEX. CONST. art. V, § 5.

relevant to this petition are the Double Jeopardy Clause of the Fifth Amendment, U.S. CONST. amend. V, the Texas Controlled Substance Tax Act, TEX. TAX CODE ANN. § 159.001 et seq. (Vernon Supp. 1994), and TEX. CODE CRIM. PROC. ANN. § 59 (Vernon Supp. 1994).

The Texas Controlled Substance Tax Act is set out in Appendix E. Chapter 59 of the Texas Code of Criminal Procedure is set out in Appendix F.

**The Fifth Amendment**

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

**STATEMENT OF RELEVANT FACTS**

Petitioner was stopped and searched by Chambers County authorities on February 13, 1992. The

marihuana in a locked tool box, and seized a radar detector and Two Thousand One Hundred Sixty-five dollars and no/100 ($2,165.00) in United States Currency. Petitioner was subsequently indicted for aggravated possession of marihuana in cause number 7837 and for possession of marihuana on which no tax had been paid in cause number 7838.

On or about March 16, 1992, John Sharp, the Comptroller of Public Accounts of Texas served upon Petitioner a tax notice for the Marijuana and Controlled Substances Tax in the amount of One Hundred Nine Thousand, Five Hundred Forty-six dollars and 50/100 ($109,546.50),[2] as well as a Ten Thousand, Nine Hundred Fifty-four dollars and 65/100 ($10,954.65), penalty for failure to pay tax on the marijuana. Petitioner made a Two Hundred Fifty dollar and no/100 ($250.00) payment toward the amount owed. Additionally, in July 1992, the trial court ordered the Two Thousand, One Hundred Sixty-five dollars and no/100 ($2,165.00) and the radar

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[2]The tax rate on Marijuana is $3.50 a gram. TEX. TAX CODE ANN. § 159.101(b)(2)(Vernon 1992).

five dollars and no/100 ($2,165.00) and the radar detector forfeited to the State of Texas.

On October 28, 1992, Petitioner filed a plea in bar, and on February 23, 1993, Petitioner filed a pretrial application for writ of habeas corpus pursuant to TEX. CODE CRIM. PROC. ANN. § 11.08 (Vernon 1977), alleging that his right against double jeopardy as guaranteed by the Fifth Amendment of the United States Constitution and TEX. CONST. art. I, § 14, would be violated by a trial in the underlying case. The trial court denied both motions.

Petitioner filed a timely notice of appeal and the trial court was affirmed by the Court of Appeals for the First District of Texas in Ward v. State, 870 S.W.2d 659 (Tex. App. - Houston [1st Dist.] 1994, pet. ref'd). A copy of the opinion is attached hereto as Appendix A.

Petitioner filed a timely petition for discretionary review at the Court of Criminal Appeals which was refused.[3]

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[3]A copy of the notification from the Court of Criminal Appeals on denial of discretionary review is attached hereto as Appendix B.

## REASONS FOR REVIEW

Petitioner asserts that review is proper pursuant to Rule 10.1(c) in that the Court of Appeals has decided the instant case in conflict with this Court's decision in Department of Revenue of Montana v. Kurth Ranch, 62 U.S.L.W. 4429 (U.S. June 6, 1994) and Austin v United States, 61 U.S.L.W. 488 (1993). Because Kurth Ranch, had not been decided at the time of the Court of Appeals' decision, this Court may remand to that court for reconsideration.

### An Analysis of the Texas Controlled Substance Act In Light of Kurth Ranch

The Texas Controlled Substances Tax Act is, for all practical purposes, identical to the Montana statute this Court considered in Kurth Ranch. As this Court found to be the case with the Montana statute, the Texas Tax is punitive in nature, and therefore it is subject to the Double Jeopardy Clause of the Fifth Amendment.

As with the Montana statute, the only persons

subject to taxation are those illegally in possession of specified amounts of a controlled substance. TEX. TAX CODE ANN. § 159.001(3) (Vernon Supp. 1993)(definition of "dealer"). TEX. TAX CODE ANN. § 159.103 (Vernon 1992)(exemption from tax if activity is legally authorized). See Kurth Ranch, U.S.L.W. at 4429.

Petitioner asserts that this drug tax is just another form of punishment for violations of Texas' drug laws, not a tax on controlled substances for the purpose of revenue generation. Taxes that are only imposed upon those involved in criminal activity are another form of punishment. In Kurth Ranch, this Court Stated, "This tax, imposed on criminals and no others, departs so far from normal revenue laws as to become a form of punishment." Id. In fact, one aspect of the Texas tax that is indicative of its punitive nature, rather than legitimate revenue generation, is the fact that legal activities are subject to taxation if they are presented to the public as illicite drug transactions. The Texas tax has a provision that

subjects legal substances to the drug tax if they are "simulated controlled substances." TEX. TAX CODE ANN. § 159.101(A) (Vernon 1992); TEX. TAX CODE ANN. § 159.001(5) (Vernon 1992).[4] Therefore, oregano is subject to the tax if it is marketed as marijuana.

The Texas tax has three key characteristics in common with the Montana statute that make it "a concoction of anomalies too far removed in crucial respects from a standard tax assessment to escape characterization as punishment for purposes of Double Jeopardy analysis". Id. at 4429.

First, the amount of tax assessed by the Texas tax statute is essentially identical to the Montana tax statute that was found to be punitive by this Court in Kurth Ranch. The Texas tax statute imposes a Three dollars and Fifty cent ($3.50) per gram tax on marijuana. TEX. TAX CODE ANN. § 159.101(b)(2) (Vernon 1992). The tax amounts to Ninety-eight

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[4]The Texas Tax Code defines a controlled substance as "a substance that is purported to be a controlled substance, but is chemically different from the controlled substance it is purported to be." TEX. HEALTH & SAFETY CODE ANN. § 482.001(4) (Vernon 1992).

dollars ($98.00) per ounce; the Montana tax statute totals One Hundred dollars ($100.00) per ounce. Id. at 4429.

A second aspect of the Texas tax that is indicative of its punitive nature is the lack of ability on the part of the taxing authorities to compromise the tax amount due, absent a prosecutorial request. TEX. TAX CODE ANN. § 159.206 (a)(1) (Vernon 1992). In fact, the ability to compromise a tax assessment is characteristic of taxes imposed for revenue raising purposes. In other so called sin taxes the state treasurer has the authority to compromise the tax amount due.[5] Likewise, the right of the state to forfeit and retain property pursuant to the Code of Criminal Procedure was given paramount import, and the taxing authority's right to collect the tax was made

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[5]The Texas Tax Code gives the state treasurer the ability compromise tax due on cigar and tobacco products before or after claim is filed in court. TEX. TAX CODE ANN. § 155.151(b) (Vernon 1992). Likewise, the state treasurer can compromise the tax due on cigarettes before or after the claim is filed in court. TEX. TAX CODE ANN. § 154.411(b) (Vernon 1992).

subordinate. TEX. TAX CODE ANN. § 159.205(b) (Vernon 1992). Accord Kurth Ranch, U.S.L.W. at 4429. In fact, the administrative proceedings to enforce the tax must be postponed at the request of the prosecuting attorney for the duration of the criminal proceedings. TEX. TAX CODE ANN. § 159.206(b) (Vernon 1992).

And finally, the Texas tax, like the Montana counterpart analyzed in Kurth Ranch is only assessed on illegal activity. The definition portion of the Texas tax statute refers to the laws that criminalize possession of the substance in the first place.[6] Kurth Ranch, slip at 6, n. 3 at 1. This tax "...is extracted only after the taxpayer has been arrested for the precise conduct that gives rise to the tax obligation in the first place." Id.

Therefore, with the Texas tax statute being identical for all practical purposes to the Montana tax statute leads to the necessary conclusion that it is but an additional punishment on persons in

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[6]TEX. TAX CODE ANN. § 159.001 (Vernon Supp. 1993)(referring to HEALTH & SAFETY CODE § 481.002, § 482.001).

violation of Texas' drug laws.

**Question 1**

In Question for Review 1, Petitioner asserts that this issue is identical to the issue decided in Kurth Ranch. The above analysis and comparison to the Montana tax statute shows that the tax is punitive and constitutes punishment under the Fifth Amendment Double Jeopardy Clause. This Court's decision in Kurth Ranch had not been handed down at the time of consideration in this case. Neither the Court of Criminal Appeals, the Court of Appeals, nor the trial court were able to benefit from the analysis therein. Therefore, this Court should grant certiorari and remand this cause to the Court of Criminal Appeals for reconsideration in light of Kurth Ranch.

**Question 2**

In Kurth Ranch, this Court reserved the question of whether assessment and payment of a punitive tax, before criminal prosecution, would act as a bar to subsequent criminal prosecution for the same activity. The Double Jeopardy provision of the

Fifth Amendment safeguards against second prosecutions and punishments for the same offense. The fact that the Texas tax constitutes punishment, as does the Montana tax, any subsequent prosecution, for the same offense would constitute a violation of the Double Jeopardy clause of the Fifth Amendment. The particular order of the punishments should be irrelevant. Kurth Ranch, slip op. at 18 (Scalia, J., dissenting). Therefore, this question too is ripe for remand to the Court of Criminal Appeals for consideration in light of the reasoning in Kurth Ranch.

**An Analysis of the Texas Code of Criminal Procedure Annotated, Chapter 59, In Light of Kurth Ranch.**

For practical purposes, the Texas forfeiture of contraband statute is identical to, in pertinent part[7], the Federal controlled substance

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[7] The Texas Forfeiture of Contraband statute is broader than the Federal counter-part. The definition of "contraband" includes several offenses subject to forfeiture not included in the narrower Federal statute. TEX. CODE CRIM. PROC. ANN.

forfeiture statute considered in Austin.[8] Like the Federal forfeiture statute, the Texas forfeiture statute is punitive in nature and is therefore subject to the Double Jeopardy Clause of the Fifth Amendment.

Like the federal statute, only persons who violate Texas penal laws are subject to forfeiture under the Texas forfeiture statute. TEX. CODE CRIM. PROC. ANN. art. 59.01(2) (Vernon Supp. 1994)(definition of "contraband"). As did Congress, the Texas legislature chose "to tie forfeiture directly to the commission of drug offenses." Austin, slip opinion at 17.

Another factor indicating the punitive nature

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art. 59.01(2)(A)(i) (Vernon Supp. 1994)(any property used in the commission of a first or second degree felony). TEX. CODE CRIM. PROC. ANN. art. 59.01(2)(A)(iii) (Vernon Supp. 1994)(any property used in the commission of a felony under the Securities Act).

The federal statute is identical to the Texas statute, if "contraband" is limited to a portion of its definition. TEX. CODE CRIM. PROC. ANN. art. 59.01(2)(B)(i) (Vernon Supp. 1994)(any property used or intended to be used in violation of Texas Controlled Substance Act).

[8]Austin v United States, 61 U.S.L.W. 488 (1993).

of the Texas forfeiture statute that was present in its federal counter-part is the inclusion of an "innocent owner" defense. TEX. CODE CRIM. PROC. ANN. art. 59.02(c)(2) (Vernon Supp. 1994), U.S.C. §§881(a)(4)(C), and (a)(7). This provision demonstrates a legislative intent to impose the penalty of forfeiture on those involved in a criminal activity, which makes the statute "look more like punishment, not less." Austin, slip opinion at 17.

As this Court pointed out in both Austin and Ward[9] the fact that the value of property forfeitable under one of these statutes can vary so dramatically, any relationship between the Government's actual costs and the amount of a forfeiture is merely coincidental, and forfeiture as a penalty has no correlation to any damages sustained by society. Austin, slip opinion at 17. The lack of correlation to the damages the offender's conduct cost society was one of the main

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[9]United States v Ward, 448 U.S. 242, 254 (1980).

reasons this Court found Montana's marijuana tax to be a punishment for Double Jeopardy purposes in Kurth Ranch.[10] The same fact scenario is present with Petitioner. The amount of the forfeiture would be the same no matter the damages suffered by society. In fact, the reality in Kurth Ranch was that the government was attempting to take possession of the Kurth's property, their ranch, because of the Kurth's involvement in illegal activity. This is the exact same thing that the government has already done to Petitioner.

As this Court stated in Kurth Ranch, "...fines, penalties and forfeitures are readily characterized as sanctions,...". Kurth Ranch, 62 U.S.L.W. at 4433. (emphasis added). Therefore, a forfeiture of this nature, "...that cannot fairly be said *solely* to serve a remedial purpose, but rather can only be explained as also serving either retributive or

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[10]This Court in Kurth Ranch noted that the assessment of the marijuana tax does not correlate to any damages incurred by the government since the calculation was based on weight not estimated damage to society. Likewise, the government failed to even attempt to prove its damages. Kurth Ranch, slip opin. at 9.

deterrent purposes, is punishment, as we have come to understand that term." Austin, slip opinion at 19, quoting United States v Halper, 490 U.S. 435, 448 (1989).

> ...[C]ivil forfeitures, and taxes all share certain features: They generate government revenues, impose fiscal burdens on individuals, and deter certain behavior. All of these sanctions are subject to constitutional restraint.

Kurth Ranch, 62 U.S.L.W. at 4432.

It is well settled that the evil to be prevented by the Double Jeopardy Clause of the Fifth Amendment is a second punishment or prosecution for the same offense.

**Question 3**

In his Question for Review 3, Petitioner asserts that the issue is essentially identical to that decided in Austin and Kurth Ranch; is the government's taking of property, because of petitioner's involvement in illegal activity punishment for Fifth Amendment Double Jeopardy purposes? Based on the analysis of the Texas forfeiture statute set out above, the forfeiture

is punitive and constitutes punishment for purposes of the Fifth Amendment Double Jeopardy Clause. Neither the Court of Criminal Appeals, the Court of Appeals nor the trial court had the benefit of this Court's decision in Kurth Ranch at the time of consideration of this case. Likewise, those Courts ruled in direct conflict with this Court's decision in Austin and Kurth Ranch. Therefore, this Court should grant certiorari and either set this issue for oral argument or remand this cause to the Court of Appeals for reconsideration in light of Kurth Ranch and Austin.

**Question 4**

The issue presented by Petitioner as Question 4 has not as of yet been directly addressed by this Court. The reasoning of this Court on several related issues logically leads to the natural conclusion that a forfeiture, being a punishment, for Eighth Amendment purposes in Austin and mentioned as punishment for Fifth Amendment purposes in Kurth Ranch

should naturally bar any subsequent attempt to prosecute Petitioner for the same offense. Applying the constitutional prohibition on multiple punishments, the order of the punishments cannot make any difference. Kurth Ranch, slip opinion at 18 (Scalia, J., dissenting). What matters is that punishment has been assessed. Once it has, the Fifth Amendment forbids a second punishment.

## CONCLUSION

**WHEREFORE, PREMISES CONSIDERED,** Petitioner prays that this Court grant his petition for writ of certiorari and remand this case to the Court of Appeals for reconsideration in view of Kurth Ranch **or in the alternative,** that this Court grant his petition for writ of certiorari, order full briefs and oral argument and reverse the judgement of the Texas Court of Appeals.

Respectfully submitted,

**Turner & Gottlieb**

Robert G. Turner
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(713) 526-9575
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## CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that a true and correct copy of the above and foregoing Petition for Writ of Certiori to the Court of Appeals for the First District of Texas, has been mailed by United States Postal Service to Mr. Michael R. Little, Chambers County District Attorney, P. O. Box 1409, Anahuac, Texas 77514, and to the Attorney General of Texas, Supreme Court Building, Austin, Texas 78711, on this the ___ day of _____, 1994.

_____

ROBERT G. TURNER

# APPENDIX A

Judgment affirmed and Opinion filed January 27, 1994

SEAL

IN THE
COURT OF APPEALS
FOR THE
FIRST DISTRICT OF TEXAS

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NOS. 01-93-00294-CR
01-93-00301-CR

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CURTIS RAY WARD, Appellant

V.

THE STATE OF TEXAS, Appellee

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On Appeal form the 344th District Court
Chambers County, Texas
Trial Court Cause Nos. 7837, 7838

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**OPINION**

In this accelerated appeal, appellant Curtis Ray Ward asserts the trial court erred in denying habeas corpus relief. We affirm.

**Factual and procedural background**

According to his plea in bar, appellant was stopped and searched by Chambers County authorities on February 13, 1992. The officers found 78 pounds of marihuana in a locked tool box, and seized a radar detector and $2,165 in cash. Appellant was indicted for aggravated possession of marihuana (cause number 7837) and for possession of marihuana on which no tax had been paid (cause number 7838).

On March 16, 1992, John Sharp, Comptroller of Public Accounts, sent appellant a notice of tax due, advising appellant that he owed $109,546.50,[1] as well as a $10,954.65 penalty for failure to pay tax on the marihuana. Appellant made a $250.00 payment on the amount owed.

The State filed a motion for summary judgment seeking forfeiture of the cash and radar detector seized by the police. Appellant did not contest the motion, and in July 1992, the trial court granted the motion and ordered $2,165.00 and the radar detector forfeited to the State of Texas.

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[1] Marihuana is taxed at a rate of $3.50 a gram. TEX. TAX CODE ANN. § 159.101(b)(2)(Vernon 1992).

On October 28, 1992, appellant filed a plea in bar, and on February 23, 1993, he filed an application for writ of habeas corpus. In both, he asserted that because he "suffered a fine and forfeiture, clearly penal in nature, arising out of the transaction leading to Applicant's criminal prosecution," prosecution for the charged offenses would subject him to double jeopardy. The trial court denied both motions. Cause numbers 7837 and 7838 are currently pending in the 344th District Court of Chambers County.

DOUBLE JEOPARDY

In two points of error, appellant asserts he was punished for both offenses when his property was forfeited and the State assessed a tax, and the double jeopardy projections of the United States and Texas Constitutions bar prosecution of the offenses.

The double jeopardy clause of the fifth amendment[2] protects against three distinct abuses: a second prosecution for the same offense after acquittal; a second prosecution for the same offense after conviction; and multiple punishments for the same offense. *United States v. Halper*, 490 U.S. 435, 440, 109 S.Ct. 1892, 1897 (1989). This case involves the third of these projections.

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[2] U.S. CONST. amend. V.

**1. The relevant cases**

Appellant relies on *Halper* in which the Supreme Court considered whether and under what circumstances a civil penalty may constitute "punishment" for the purposes of double jeopardy analysis. 490 U.S. at 436, 109 S.Ct. at 1895. In *Halper*, the defendant was convicted for submitting 65 false medical claims to the government for reimbursement, in violation of the criminal false claims statute.[3] His false claims amounted to $585. He was sentenced to two years in prison and fined $5,000. The government then brought civil action against him under the civil false claims statute[4] for the same conduct. The district court granted summary judgment for the government on the issue of liability, but found the civil penalty for which Halper would be liable -- $130,000 -- violated the double jeopardy clause. 90 U.S. at 437-39, 109 S.Ct. at 1895-97. The Supreme Court agreed, holding that "under the Double Jeopardy Clause a defendant who has already been punished in a criminal prosecution may not be subject to an additional civil sanction to the extent that the second sanction may not be fairly characterized as remedial, but only as a deterrent or retribution." 490 U.S. at 448-49,

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[3] 18 U.S.C.A. § 287 (West Supp. 1993).

[4] 31 U.S.C.A. § 3729 (West supp. 1993).

109 S.Ct. at 1902. The Court further provided:

> What we announce now is a rule for the rare case, the case such as the one before us, where a fixed-penalty provision subjects a prolific but small-gauge offender to a sanction overwhelmingly disproportionate to the damages he has caused. The rule is one of reason: Where a defendant previously has sustained a criminal penalty and the civil penalty sought in the subsequent proceeding bears no rational relation to the goal of compensating the Government for its loss, but rather appears to qualify as "punishment" in the plain meaning of the word, then the defendant is entitled to an accounting of the Government's damages and costs to determine if the penalty sought in fact constitutes a second punishment.

490 U.S. at 449-50, 109 S.Ct. at 1902. The Court went on to state:

> [T]he only proscription established by our ruling is that the Government may not criminally prosecute a defendant, impose a criminal penalty upon him, and then bring a separate civil action based on the same conduct and receive a judgment that

is not rationally related to the goal of making the Government whole.

490 U.S. at 451, 109 S.Ct. at 1903. The Court remanded the case to the district court to allow the government to provide an accounting of the costs arising out of Halper's fraud. 490 U.S. at 451, 109 S.Ct. at 1904.

Appellant also relies upon *In re Kurth Ranch*, 986 F.2d 1308 (9th Cir. 1993), *cert. granted*, 114 S.Ct. 38 (1993), in which the court of appeals found the Montana marijuana tax was unconstitutional as applied against the defendants. *Id.* at 1312. The Kurths were arrested for criminal possession and sale of dangerous drugs. They had been growing large quantities of marijuana on the family ranch. *Id.* at 1309. The State assessed a drug tax of $865,000 against the defendants. The defendants challenged the amount and the legality of the assessment, but their challenge was suspended pending disposition of the criminal charges. The defendants pled guilty and received individual sentences. *Id.* at 1310. The Kurths then filed bankruptcy, and the State filed a proof of claim for the tax with the bankruptcy court. The bankruptcy court found that only $208,105 of the tax was computed in compliance with the statute, but held even this amount violated the double jeopardy clause. *Id.* The Ninthth Circuit agreed; it found that *Halper's* disproportionality analysis applied, but held

that because the state "refused to make any showing regarding the costs incurred in readicating dangerous drugs and their effects," it failed to meet the threshold requirements of *Halper*. *Kurth*, 986 F.2d at 1312. The court therefore found the tax assessment was an impermissible second punishment that violated the double jeopardy clause. *Id.*

One further case, cited by both appellant and the State, is particularly relevant. In *United States v. Sanchez-Escareno*, 950 F.2d 193 (5th Cir. 1991), *cert. denied*, 113 S.Ct. 123 (1992), three defendants who attempted to smuggle marihuana across the mexican border were assessed large civil penalties. The defendants signed promissory notes, promising to pay the fines, and were indicted for various offenses relating to the drugs. *Id.* at 195-97. The district court dismissed all counts on the basis of double jeopardy, even though none of the defendants paid the penalties and the government had made no attempt to collect on the notes. *Id.* at 197. The court of appeals found it did not matter that the assessment of the civil penalty came before the criminal proceedings, stating, "[T]he *Halper* principle that a civil penalty can be factored into the double jeopardy matrix should apply whether the civil penalty precedes or follows the criminal proceeding." *Id.* at 200. The court held, however, that the execution of the promissory notes, in the

absence of a judgment or payment by the defendants, did not constitute "punishment" under the double jeopardy clause. *Id.* at 201.

**2. Analysis**

Appellant complains that the only evidence offered by the State at his habeas corpus hearing was the affidavit of Wayne Dial, assistant commander of the Chambers County Narcotics Trafficking Task Force, in which Officer Dial stated the current price of one-fourth of an ounce of marihuana was between $30 and $40. The State presented no evidence regarding its costs or damages.[5] Although he does not expressly so state, we presume appellant believes the amount of the tax and forfeiture is disproportionate to the State's costs, particularly in the absence of evidence of the State's damages and costs, and that prosecution for the charged offenses would therefore constitute an impermissible second punishment. In conducting this double jeopardy analysis, we will consider the forfeiture and the tax assessment separately.

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[5] The State relies on Officer Dial's affidavit to establish the amount of tax is reasonably related to the value of the marihuana. *Halper* provides, however, that a civil penalty must be rationally related to the goal of making the government whole. 490 U.S. at 451, 109 S.Ct. at 1903. We think the relationship between the tax assessed and the value of the marihuana is irrelevant to our double jeopardy analysis.

**A. Tax assessment**

The State assessed a tax and penalty of $120,501.15. Appellant has paid $250 of this amount. For two reasons, we believe this assessment does not constitute a "punishment." First, appellant was *assessed* this amount. The State has not sought a judgment against appellant, and there has been no adjudication by a court. The assessment of a penalty does not constitute punishment that causes jeopardy to attach. *Ex Parte Wisenbaker*, 762 S.W.2d 218, 219 (Tex. App. -- Houston [1st Dist.] 1988, pet. ref'd). Furthermore, *Halper* expressly contemplates a criminal prosecution and a civil action that results in a judgment. *Halper*, 490 U.S. at 451, 109 S.Ct. at 1903; *see also Sanchez-Escareno*, 950 F.2d at 201 (in the absence of a judgment or payment, execution of promissory notes did not constitute "punishment").

Second, in the absence of payment by appellant, the assessment does not constitute "punishment." *See Sanchez-Escareno*, 950 F.2d at 201. We are aware that appellant paid $250 towards the amount owed, but this payment is an infinitesimal portion of the total assessment. In the absence of payment in full, or at least a substantial portion of the total amount, we cannot find the assessment constituted a "punishment." In *In re Bradley*, 318 U.S. 50, 63 S.Ct. 470 (1943), although the applicable

statute provided for either a fine or imprisonment, a district court sentenced the defendant to a six-month jail term and fined him $500. The defendant was jailed; a few days later his attorney paid the fine. The trial court, realizing its error, issued an order amending the sentence to omit the fine, and instructed the court clerk to return the money. *Bradley*, 318 U.S. at 51-52, 63 S.Ct. at 470. The Supreme Court ordered the defendant released, stating,

> When . . . the fine was paid to the clerk and receipted for by him, the petitioner had complied with a portion of the sentence which could lawfully have been imposed. As the judgment of the court was thus executed so as to be *a full satisfaction* of one of the alternative penalties of the law, the power of the court was at an end.

*Id.* (emphasis added); *see also Ex parte Lange*, 18 Wall. 163, 176, 85 U.S. 163, 176 (1873) (where prisoner had "fully performed, completed, and endured one of the alternative punishments which the law prescribed for the offense [by paying the fine]," the court's power to punish for that offense was at an end). Appellant paid 1/480 of the total assessment. We find this amount too insignificant to constitute payment. In the absence of payment, there was no

"punishment."

**B. Forfeiture**

Appellant's radar detector and $2,165 in cash were forfeited to the State. The State asserts the forfeiture statute is not penal in nature because, among other reasons, the statute provides that forfeiture actions shall be governed by the civil rules of procedure and the state has the burden of proof by a preponderance of the evidence. TEX. CODE CRIM. P. ANN. art. 59.05(a),(b) (Vernon Supp. 1993). We do not find this dispositive. "[T]he labels 'criminal' and 'civil' are not of paramount importance. It is commonly understood that civil proceedings may advance punitive as well as remedial goals ...." *Halper*, 490 U.S. at 447, 109 S.Ct. at 1901. We are persuaded, however, by the State's argument that the statute is remedial.

Article 59.06 provides for the disposition of forfeited property, and specifies that forfeited funds and funds derived from the sale of forfeited property shall be used for law enforcement purposes, and drug abuse and chemical dependency treatment programs. TEX. CODE CRIM. P. ANN. ART. 59.06(c),(h)(Vernon Supp. 1993). These goals are clearly remedial in nature. *Ex parte Rogers*, 804 S.W.2d 945, 950 (Tex. App. -- Dallas 1990, no pet.).

*Halper* reminds us that "punishment serves the twin aims of retribution and deterrence" and provides that "a civil sanction that cannot

fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment ...." 490 U.S. at 448, 109 S.Ct. at 1902.[6] Because we find the forfeiture statute is remedial, the forfeiture of appellant's cash and radar detector did not constitute punishment.

Even if the forfeiture statute was punitive, rather than remedial, we would still find that the forfeiture of appellant's money and property did not constitute a punishment. Police officers seized 78 pounds of marihuana. We do not believe the relatively modest value of the cash and property forfeited is "overwhelmingly disproportionate to the damage" appellant has caused. *Halper*, 490 U.S. at 449, 109 S.Ct. at 1902.

Conclusion

We find the forfeiture of appellant's cash and property and the tax assessment do not constitute a "punishment" and that prosecution for the charged offenses will not subject him to multiple punishment under either the United States or Texas Constitutions. We overrule

---

[6] *Halper* also reminds us that the determination whether a sanction constitutes punishment is not made from the defendant's perspective: "[F]or the defendant even remedial sanctions carry the sting of punishment." 490 U.S. at 448, 109 S.Ct. at 1902 n. 7.

appellant's points of error and affirm the trial court's denial of habeas corpus relief.

/s/ Davie L. Wilson
David L. Wilson
Justice

Justices O'Connor and Price[7] also participating.

Publish. TEX.R.APP.P. 90.

Judgment rendered and opinion delivered January 27, 1994

True Copy Attest:

/s/ Margie Thompson
Margie Thompson
Clerk of Court

---

[7] The Honorable Frank C. Price, former Justice, Court of Appeals, First District of Texas at Houston, participating by assignment.

# APPENDIX B

SEAL

Official Notice
Court of Criminal Appeals

May 18, 1994
COA#: 01-93-00301-CR

RE: Case No. 0284-94
STYLE: WARD, EX PARTE CURTIS RAY

On this day, the Appellant's Petition for Discretionary Review has been REFUSED.

Thomas Lowe, Clerk

---

Court of Criminal Appeals
P. O. box 12308, Capital Station
Austin, Texas 78711

MAIL TO: ROBERT G. TURNER
3714 AUDUBON PLACE
HOUSTON, TX 77006

# APPENDIX C

District Clerk
R. B. Scherer, Jr.
Deputies
Dorothy McCulley
Betty Hinze
Joyce Moon

P. O. Drawer NN
Anahuac, Texas 77514
Telephone
713/267-3175

**THE COUNTY OF CHAMBERS**
**ANAHUAC, TEXAS 77514**

Curtis Ray Ward
P. O. Box 7971
Donthan, Alabama 36302

Dear Sir:

In accordance with the provisions of Rule 306d of the Texas Rules of Civil Procedure, you are hereby notified that immediately prior to the mailing of this notice in Cause No: 14000, The State of Texas vs. $2,165.00 U.S. Currency, ET AL in the 344th Judicial District Court, Chambers County,Texas, a final judgment, or other appealable order, was entered on the 28th day of July,A.D., 19 92 .
Summary Judgment

R. B. Scherer, Jr.,
District Clerk
By /s/ Lou Ann Lamb
Deputy

cc: Michael Little

# APPENDIX D

05 [illegible] 90100

XAS NOTICE OF TAX DUE

c. Type of tax
MARIHUANA AND CONTROLLED SUBSTANCES TAX

d. Date of notice: 03/16/92
e. Taxpayer number: 2-266-19-9198-8
f. Amount of your payment: $ 250,00

Taxpayer name and mailing address
Curtis Ray Ward
P.O. Box 7071
Dothan, AL 36302

Make check payable to
STATE TREASURER
Mail to
JOHN SHARP
COMPTROLLER OF PUBLIC ACCOUNTS
Austin, Texas 78774-0100

UNITED STATES POSTAL MONEY ORDER

46889876452 921001 324250 *250*00

| | | |
|---|---|---|
| Pay to STATE TREASURY | CHECK/WRITER DISTRICT AREA | $250.00 |
| ADDRESS | From CURTIS WARD | |
| | ADDRESS P.O. BOX 367 | |
| C.O.D. NO. OR USCO FEE | VERNON, FL 32462 | |

:000000800 2: 46889876452 2

PLEASE DETACH AND RETURN TOP PORTION WITH YOUR PAYMENT

# TEXAS NOTICE OF TAX DUE

| Date of notice | Taxpayer number |
|---|---|
| 03/16/92 | 2-266-19-9198-8 |

| Type of tax | Period of liability | |
|---|---|---|
| MARIHUANA AND CONTROLLED SUBSTANCES TAX | 02/13/92 | to XXX |

REASON FOR TAX DUE: Failure to pay the tax on the purchase, acquisition , importation, manufacture or production of marihuana, controlled substances, counterfeit substances, simulated controlled substance or a mixture of any of the materials that contain a controlled substance, counterfeit substance, simulated controlled substance, or marihuana. The Comptroller has determined that the amount assessed is in jeopardy and is due and payable immediately.

| | |
|---|---|
| TAX DUE | $109,546.50 |
| PENALTY | 10,954.65 |
| INTEREST (through 03/16/92 ) | 0.00 |

| | |
|---|---|
| TOTAL LIABILITY AS OF DATE OF NOTICE | a. $ 120,501.15 |

Any additional charges assessed after the date of notice are listed below

IF PAID AFTER 04/06/92 , ADD AN ADDITIONAL 10% PENALTY OF $ 10,954.65

IF PAID AFTER 04/13/92 ,ADD INTEREST AT 12 % PER ANNUM, COMPOUNDED MONTHLY UNTIL PAID.

| | |
|---|---|
| b. | |
| c. | |
| d. | |
| e. | |
| TOTAL AMOUNT DUE ON DATE OF PAYMENT (Add a, b, c, d and e) | $ |

*This liability is in addition to any other assessments you may have received for other reporting periods or other taxes.*

## TAXPAYER RIGHTS SUMMARY

*If you do not agree with the tax on this billing, you may file a request on or before* 04/06/92 *for a hearing. Your request must be filed with this office and include a statement which lists the specific reasons why you disagree.*

**See the back of this notice for explanation.*

*If you do not request a hearing and you fail to pay the amount due, several actions may be initiated to protect the interests of the State. These include but are not limited to, [illegible] suit for injunction and/or judgment, revocation or suspension of any permit, license or certificate issued by the Comptroller, withholding of state issued warrants, forfeiture of bond or security posted, requiring new or additional bond or security, freezing of assets, seizure and sale of properties.* **(TEX. TAX CODE ANN. SECS. 111.021 AND 111.022.)**

John Sharp

JOHN SHARP
COMPTROLLER OF PUBLIC ACCOUNTS

For tax assistance call 1-800-252-5555 toll free nationwide, or call 512/463-4600.
*If from a Telecommunication Device for the Deaf (TDD) ONLY call 1-800-248-4099 toll free, or call 512/463-4621.*

# APPENDIX E

# CHAPTER 159. CONTROLLED SUBSTANCE TAX

## SUBCHAPTER A. GENERAL PROVISIONS

### § 159.001. Definitions

In this chapter:

(1) *"Controlled substance"* has the meaning assigned by Section 481.002, Health and Safety Code.

(2) *"Counterfeit substance"* has the meaning assigned by Section 481.002, Health and Safety Code.

(3) *"Dealer"* means a person who in violation of the law of this state imports into this state or manufactures, produces, acquired, or possesses in this state:

(A) seven grams or more of a taxable substance consisting of or containing a controlled substance, counterfeit substance, or simulated controlled substance;

(B) fifty dosage units or more of a taxable substance not commonly sold by weight, consisting of or containing a controlled substance,

counterfeit substance, or simulated controlled substance; or

(C) more than four ounces of a taxable substance consisting of or containing marihuana.

(4) *"Marihuana"* has the meaning assigned by Section 481.002, Health and Safety Code.

(5) *"Simulated controlled substance"* has the meaning assigned by Section 482.001, Health and Safety Code.

(6) *"Tax payment certificate"* means a stamp or other device provided by the comptroller under Section 159.003 of this code for use under this chapter.

(7) *"Taxable substance"* means a controlled substance, a counterfeit substance, a simulated controlled substance, or marihuana, or a mixture of any materials that contains a controlled substance, counterfeit substance, simulated controlled substance, or marihuana.

(8) *"Dosage unit"* means a tablet, pill, capsule, vial, ampule, or other identifiable or separated unit designed or packaged to be used, taken, or ingested at one time.

**§ 159.003. Tax Payment Certificates**

(a) The comptroller shall adopt a uniform system for providing, affixing, and displaying official tax payment certificates to be attached to a taxable substance as evidence that the tax imposed by this chapter has been paid.

(b) A tax payment certificate may not be used more than once.

**§ 159.004. No Defense or Immunity**

Nothing in this chapter provides a defense or affirmative defense to, exception to, or immunity from prosecution under the penal laws of this state relating to controlled substances, counterfeit substances, simulated controlled substances, or marihuana.

**§ 159.005. Confidential Information**

(a) Information provided by a person in a report or return made for purposes of paying tax imposed by this chapter is confidential.

(b) The comptroller or any other public offical or employee commits an offense if he reveals information made confidential by this section to

any person other than:

(1) to the comptroller or a public official or employee whose duties involve the administration or collection of the taxes imposed by this chapter; or

(2) in a judicial proceeding involving a tax imposed by this chapter.

(c) An offense under Subsection (b) of this section is a Class A misdemeanor.

(d) Except in a prosecution directly related to a tax imposed by this chapter, information made confidential by this section may not be used in any way in a prosecution of the dealer for whom the report or return is made unless the information is obatained independently of the report or return.

## SUBCHAPTER B. IMPOSITION, RATE, AND PAYMENT OF TAX

### § 159.101. Tax Imposed: Rate of Tax

(a) A tax is imposed on the possession, purchase, acquisition, importation, manufacture, or production by a dealer of a taxable substance on which a tax has not previously been paid

under this chapter.

(b) The rate of the tax is:

(1) $200 for each gram of taxable substance consisting of or containing a controlled substance, counterfeit substance, or simulated controlled substance;

(2) $3.50 for each gram of a taxable substance consisting of or containing marihuana; and

(3) $2,000 on each 50 dosage units, or portion of 50 dosage units, if the total amount is less than 50 dosage units, of a controlled substance that is not sold by weight.

(c) The tax becomes due immediately when a dealer possesses, purchases, acquires, manufactures, or produces in this state or imports into this state the taxable substance on which the tax has not previouisly been paid.

(d) In determining the total weight of taxable substance, a part of a gram remaining after the measurement of whole gram is considered as one gram.

(e) For purposes of this section, if a taxable substance consists of a mixture containing both marihuana and another substance listed in the definition of taxable substance provided by Section 159.001 of this code, the taxable substance is taxable under Subsection (b)(1) of this section and not under Subsection (b)(2) of this section.

(f) When the comptroller makes an assessment under this chapter, the comptroller shall issue a determination stating the amount and that the tax collection is in jeopardy. The amount determined is due and payable immediately. A determination made under this chapter becomes final on the expiration of 20 days after the day on which the notice of the determination was served by personal service or by mail unless a petition for a redetermination is filed before the determination becomes final.

(g) If a determination made under this chapter becomes final without payment of the amount of the determination being made, the comptroller shall add to the amount a penalty of 10 percent of the amount of the tax and interest.

(h) In a redetermination proceeding held or a judicial proceeding brought under this chapter, a certificate from the comptroller that shows the issued determination is prima facie evidence

of:

(1) the determination of the stated tax or amount of the tax;

(2) the stated amount of the penalties and interest; and

(3) the compliance of the comptroller with this chapter in computing and determining the amount due.

(i) The suppression of evidence on any ground in a criminal case that arises out of facts on which a determination is made under this chapter or the dismissal of criminal charges in such a case does not affect a determination made under this chapter.

**§ 159.102. Tax Payment Certificate Required**

(a) A dealer who pays a tax imposed by this chapter shall securely affix in the manner required by the comptroller to the taxable substance the approriate tax payment certificate to show payment of the tax.

(b) A dealer shall obtain the necessary tax payment certificates before the tax becomes due as provided by Section 159.101 of this code.

The possession of a taxable substance without the possession of the requisite amount or number of certificates is prima facie evidence that and is notice that the tax has not been paid as required by this chapter.

(c) The comptroller's rules shall provide for the return of unused certificates and for the refund of money for returned certificates.

**§ 159.103. Exemption**

The purchase, acquisition, importation, manufacture, or production of a taxable substance is exempt from the tax imposed by this chapter if the activity is authorized by law.

## SUBCHAPTER C. CRIMINAL PROVISIONS; SEIZURE AND FORFEITURE

**§ 159.201. Possession of Item if Tax Unpaid**

(a) A dealer commits an offense if the dealer possesses a taxable substance on which the tax imposed by this chapter has not been paid.

(b) An offense under this section is a felony of the third degree. In addition to the fine provided by law for a felony of the third

degree, a person convicted of an offense under this section shall be fined an amount equal to the amount of tax due and unpaid on the taxable substance that is the subject of the offense.

(c) An indictment for an offense under this section may be presented within six years from the date of the offense and not afterward.

**§ 159.202. Counterfeit Tax Payment Certificates**

(a) A person commits an offense if the person:

(1) prints, engraves, makes, issues, sells, or circulates a counterfeit tax payment certificate;

(2) possesses with intent to use, sell circulate, or pass a counterfeit tax payment certificate; or

(3) places or causes to be placed a counterfeit tax payment certificate on a taxable substance.

(b) An offense under this section is a felony of the third degree.

(c) Venue of a prosecution under this section is in Travis County.

**§ 159.203. Previously Used Certificates**

A person commits an offense if the person:

(1) uses, sells, offers for sale, or possesses for use of sale previously used tax payment certificates; or

(2) attaches or causes to be attached previously used tax payment certificate to a taxable substance.

**§ 159.204. Property Subject to Seizure**

A peace officer may seize without a warrant:

(1) any taxable substance on which the tax imposed by this chapter has not been paid;

(2) any counterfeit tax payment certificate used or intended for use in violation of this chapter;

(3) any previously used tax payment certificate possessed in violation of this chapter;

(4) any raw material, products, containers or equipment of any kind used or intended for use in violation of this chapter; or

(5) any conveyance, including a vehicle, vessel, or aircraft, used or intended for use to transport or in any manner facilitate the transportation, sale, receipt, possession, concealment, or delivery of any property in violation of this chapter.

**§ 159.205. Forfeiture**

(a) Property seized under Section 159.204 of this code is subject to forfeiture to the state in the same manner as provided for forfeiture of seized property under Chapter 103, Alcoholic Beverages Code. Property forfeited to the state that is not ordered destroyed may be used by the seizing agency for official purposes or sold at public auction in the manner provided by law for sheriff's sales. The proceeds from the sale of property forfeited under this section, after satisfaction of all costs, shall be disposed of in the manner provided for by Article 59.06, Code of Criminal Procedure.

(b) The right of the comptroller to collect the tax imposed by this chapter, including applicable penalty and interest, is subordinate to the right of a federal, state, or local law enforcement authority to seize, forfeit, and retain property under Chapter 481, Health and Safety Code; Chapter 59, Code of Criminal

Procedure; or any other criminal forfeiture law of this state or of the United States. A lien filed by the comptroller as a result of the failure of a dealer to pay the tax, penalty, or interest due under this chapter is also subordinate to those rights. This section does not affect the validity of a lien or a collection action relating to the tax imposed by this chapter under any other circumstances.

**§ 159.206 Settlement or Compromise of Tax**

(a) The comptroller may settle or compromise a tax, penalty, or interest imposed under this chapter only if:

(1) the prosecutor of a criminal offense under this chapter or of another offense arising out of the same incident or transaction requests in writing that the comptroller settle or compromise and specifies the reasons for the request; and

(2) the comptroller determines that the settlement or compromise is in the best interest of the state.

(b) The prosecutor of a criminal offense under this chapter or of another criminal offense

arising out of the same incident or transaction or the taxpayer or the taxpayer's representative may request in writing that the comptroller defer an administrative hearing on a determination made on this chapter until a trial has been completed in the criminal case involving the same incident or transaction or another disposition has been made of the case. The comptroller may comply with a request to defer an administrative hearing if the compltroller determines that the deferral would be in the best interest of the state. This subsection does not prohibit the comptroller from filing a lien or taking any other action to collect the tax in the manner permitted under this code before the conclusion of an administrative hearing.

## SUBCHAPTER D. DISPOSTION OF PROCEEDS

### § 159.301. Disposition of Proceeds

All proceeds from the collection of the tax, penalty, and interest imposed by this chapter shall be deposited to the credit of the general revenue fund. The fine imposed by Section 159.201(b) of this code and the fine provided by law for a felony shall be deposited to the credit of the county treasury of the county in which the offense occurred.

# APPENDIX F

**Art. 59.01. Definitions**

In this chapter:

(1) *"Attorney representing the state"* means the prosecutor with felony jurisdiction in the county in which a forfeiture proceeding is held under this chapter or, in the proceeding for forfeiture of contraband as defined under Subdivision (2)(B)(iv) of this article, the city attorney of a municipality if the property is seized in that municipality by a peace officer employed by that municipality and the governing body of the municipality has approved procedures for the city attorney acting in a forfeiture proceeding.

(2) *"Contraband"* means property of any nature, including real, personal, tangible, or intangible, that is:

(A) used in the commission of:

(i) any first or second degree felony under the Penal Code;

(ii) any felony under Chapters 29, 30, 31, or 32, Penal Code; or

(iii) any felony under The Securities Act (Article 581- 1 et seq., Vernon's

Texas Civil Statutes);

(B) used or intended to be used in the commission of:

(i) any felony under Chapter 481, Health and Safety Code (Texas Controlled Substances act);

(ii) any felony under Chapter 483, Health and Safety Code;

(iii) a felony under Article 350, Revised Statutes; or

*Text of subpar. (iv) as added by Acts 1993, 73rd Leg., ch. 761, § 5*

(iv) any felony under Chapter 34, Penal Code; or

*Text of subpar. (iv) as added by Acts 1993, 73rd Leg., ch. 828, § 1*

(iv) a Class A misdemeanor under subchapter B, Chapter 365, Health and Safety Code, if the defendant has been previously convicted twice of an offense under that subchapter;

(v) any felony under The Sale of Check Act (Article 489d, Vernon's texas Civil Statutes);

(C) the proceeds gained from the commission of a felony list in Paragraph (A) or (B) of this subdivision or a crime of violence; or

(D) acquired with proceeds gained from the commission of a felony listed in Paragraph (A) or (B) of this subdivision or a crime of violence.

(3) *"Crime of violence"* has the meaning assigned by Section 3, Crime Victims Compensation Act (Article 8309-1, Vernon's Texas Civil Statutes).

(4) *"Interest holder"* means the bona fide holder of a perfected lien or a perfected security interest in property.

(5) *"Law enforcement agency"* means an agency of the state or an agency of a political subdivision of the state authorized by law to employ peace officers.

(6) *"Owner"* means a person who claims an equitable or legal ownership interest in property.

(7) *"Proceeds"* includes income a person accused or convicted of a crime or the person's representative or assignee receives from a movie, book, magazine article, tape recording, phonographic record, radio or television presentation, or live entertainment in which the crime was reenacted.

(8) *"Seizure"* means the restraint of property by a peace officer under Article 59.03(a) or the officers authority.

Added by Acts 1989, 71st Leg., 1st C.S., ch. 12, § 1, eff. Oct. 18, 1989. Subsec. (2) amended by Acts 1991, 72nd Leg., ch. 102, § 2, eff. Sept. 1, 1991; Subsecs. (1), (2) amended by Acts 1993, 73rd Leg., ch. 828, § 1, eff. Sept. 1, 1993; Subsec. (2) amended by Acts 1993, 73rd Leg., ch. 761, § 5, eff. Sept. 1, 1993. Amended by Acts 1993, 73rd Leg., ch. 780, § 1, eff. Sept. 1, 1993.

**Art. 59.02. Forfeiture of contraband**

(a) Property that is contraband is subject to seizure and forfeiture under this chapter.

(b) Any property that is contraband other than property held as evidence in a criminal investigation or a pending criminal case, money, a negotiable instrument, or a security that is seized under this chapter may be replevied by the owner or interest holder of the property, on execution of a good and valid bond with

sufficient surety in a sum equal to the appraised value of the property replevied. The bond amy be approved as to form and substance by the court after the court gives notice of the bond to the authority holding the seized property. The bond must be conditioned:

(1) on return of the property to the custody of the state on the day of hearing of the forfeiture proceedings; and

(2) that the interest holder or owner of the property will abide by the decision that may be made in the cause.

(c) An owner or interest holder's interest in property may not be forfeited under this chapter if the owner or interest holder:

(1) acquired and perfected the interest before or during the act or omission giving rise to forfeiture or, if the property is real property, he acquired an ownership interest, security interest, or lien interest before a lis pendens notice was filed under Article 59.04(g) of this code; and

(2) did not know or should not reasonably have known of the act or omission giving rise to the forfeiture or that it was

likely to occur at or before the time of acquiring and perfecting the interest or, if the property is real property, at or before the time of acquiring the ownership interest, security interest, or lien interest.

(d) On motion by any party or on the motion of the court, after notice in the manner provided by Article 59.04 of this code to all known owners and interest holders of the property subject to forfeiture under this chapter, and after a hearing on the matter, the court may make appropriate orders to preserve and maintain the value of the property until a final disposition of the property is made under this chapter, including the sale of the property if that is the only method by which the value of the property may be preserved until final disposition.

(e) Any property that is contraband and has been seized by the institutional division of the Texas Department of Criminal Justice shall be forfeited to the institutional division under the same rules and conditions as for other forfeitures.

(f) An individual, firm, corporation, or other entity insured under a policy of title insurance may not assert a claim or cause of action on or

because of the policy if the claim or cause of action is based on forfeiture under this chapter and, at or before the time of acquiring the ownership of real property, security interest in real property, or lien interest against real property, the insured knew or reasonably should have known of the act or omission giving rise to the forfeiture or that the act or omission was likely to occur.

(g) The forfeiture provisions of this chapter apply to contraband as defined by Article 59.01(2)(B)(iv) of this code only in a municipality with a population of $250,000 or more.

Added by Acts 1989, 71st Leg., 1st C.S., ch. 12, § 1, eff. Oct. 18, 1989. Subsec. (g) added by Acts 1993, 73rd Leg., ch. 828, § 2, eff. Sept. 1, 1993.

**Art. 59.03. Seizure of contraband**

(a) Property subject to forfeiture under this chapter may be seized by any peace officer under authority of a search warrant.

(b) Seizure of property subject to forfeiture may be made without warrant if:

(1) the owner, operator, or agent in charge of the property knowingly consents;

(2) the seizure is incident to a search to which the owner, operator, or agent in charge of the property knowingly consents;

(3) the property subject to seizure has been the subject of a prior judgment in favor of the state in a forfeiture proceeding under this chapter; or

(4) the seizure was incident to a lawful arrest, lawful search, or lawful search incident to arrest.

(c) A peace officer who seized property under this chapter has custody of the property, subject only to replevy under Article 59.02 of this code or an order of a court. A peace officer who has custody of property shall provide the attorney representing the state with a sworn statement that contains a schedule of the property seized, an acknowledgment that the officer has seized the property, and a list of the officer's reasons for the seizure. Not later than 72 hours after the seizure, the peace officer shall:

(1) place the property under seal;

(2) remove the property to a place ordered by the court; or

(3) require a law enforcement agency of the state or a political subdivision to take custody of the property and move it to a proper location.

Added by acts 1989, 71st Leg., 1st C.S., ch. 12, § 1, eff. Oct. 18, 1989.

**Art. 59.04. Notification of forfeiture proceeding**

(a) If a peace officer seized property under this chapter, the attorney representing the state shall commence proceedings under this section not later than the 30th day after the date of the seizure.

(b) A forfeiture proceeding commences under this chapter when the attorney representing the state files a notice of the seizure and intended forfeiture in the name of the state with the clerk of the district court in the county in which the seizure is made. The attorney representing the state must attach to the notice the peace officer's sworn statement under Article 59.03 of this code. The attorney representing the state shall cause certified copies of the notice to be served on the following persons in the same manner as provided for the service of process by citation in civil

cases:

(1) the owner of the property; and

(2) any interest holder in the property.

(c) I the property is a motor vehicle, and if there is reasonable cause to believe that the vehicle has been registered under the laws of this state, the attorney representing the state shall ask the State Department of Highways and Public Transportation to identify from its records the record owner of the vehicle and any interest holder.

(d) If the property is a motor vehicle and is not registered in this state, the attorney representing the state shall attempt to ascertain the name and address of the person in whose name the vehicle is licensed in another state. If the vehicle is licensed in a state that has a certificate of title law, the attorney representing the sate shall request the appropriate agency of that state to identify the record owner of the vehicle and any interest holder.

(e) If a financing statement is required by law to be filed to perfect a security interest affecting the property, and if there is reasonable cause to believe that a financing

statement has been filed, the attorney representing the state who commences the proceedings shall ask the appropriate official designated by Chapter 9, Business & Commerce Code, to identify the record owner of the property and the person who is an interest holder.

(f) If the property is an aircraft or a part of an aircraft, and if there is reasonable cause to believe that a perfected security instrument affects the property, the attorney representing the state shall request an administrator of the Federal Aviation Administration to identify from the records of that agency the record owner of the property and the holder of the perfected security instrument. The attorney representing the state shall also notify the Department of Public Safety in writing of the fact that an aircraft has been seized and shall provide the department with a description of the aircraft.

(g) If the property is real property, the attorney representing the state, not later than the third day after the date proceedings are commenced, shall file a lis pendens notice describing the property with the county clerk of each county in which the property is located.

(h) For all other property subject to forfeiture, if there is reasonable cause to

believe that a perfected security instrument affects the property, the attorney representing the state shall make a good faith inquiry to identify the holder of the perfected security instrument.

(i) The attorney representing the state who commences the proceedings shall cause the owner and any interest holder to be named as a party and to be served with citation as provided by the Texas Rules of Civil Procedure.

(j) A person who was in possession of the property at the time it was seized shall be made a party to the proceeding.

(k) If no person was in possession of the property at the time it was seized, and if the owner of the property is unknown, the attorney representing the state shall file with the clerk of the court in which the proceedings are pending an affidavit stating that no person was in possession of the property at the time it was seized and that the owner of the property is unknown. The clerk of the court shall issue a citation for service by publication addressed to *"The Unknown Owner of _____,"* filling in the blank space with a reasonably detailed description of the property subject to forfeiture. The citation must contain the other requisites prescribed by and be served as

provided by Rules 114, 115, and 116, Texas Rules of Civil Procedure.

(l) Proceedings commenced under this chapter may not proceed to hearing unless the judge who is to conduct the hearing is satisfied that this article has been complied with and that the attorney representing the state will introduce into evidence at the hearing any answer received from an inquiry required by Subsections (c)-(h) of this article.

Added by Acts 1989, 71st Leg., 1st C.S., ch. 12, § 1, eff. Oct. 18, 1989. Subsec. (f) amended by Acts 1991, 72nd Leg., ch. 14, § 282, eff. Sept. 1, 1991.

**Art. 59.05. Forfeiture hearing**

(a) All parties must comply with the rules of pleading as required in civil suits.

(b) All cases under this chapter shall proceed to trial int he same manner as in other civil cases. The state has the burden of proving by a preponderance of the evidence that property is subject to forfeiture.

(c) It is an affirmative defense to forfeiture under this chapter of property belonging tc the spouse of a person whose acts gave rise to the

seizure of community property that, because of an act of family violence, as defined by Section 71.01, Family Code, the spouse was unable to prevent the act giving rise to the seizure.

(d) A final conviction for an underlying offense is not a requirement for forfeiture under this chapter. An owner or interest holder may present evidence of a dismissal or acquittal of an underlying offense in a forfeiture proceeding, and evidence of an acquittal raises a presumption that the property or interest that is the subject of the hearing is nonforfeitable. This presumption can be rebutted by evidence that the owner or interest holder knew or should have known that the property was contraband.

(e) If the court finds that all or any part of the property is subject to forfeiture, the judge shall forfeit the property to the state, with the attorney representing the state as the agent for the state, except that if the court finds that the nonforfeitable interest of an interest holder in the property is valued in an amount greater than or substantially equal to the present value of the property, the court shall order the property released to the interest holder. If the court finds that the nonforfeitable interest of any interest holder is valued in an amount substantially less than the present value of the property and that the

property is subject to forfeiture, the court shall order the property forfeited to the state with the attorney representing the state acting as the agent of the state, and making necessary orders to protect the nonforfeitable interest of the interest holder. On final judgment of forfeiture, the attorney representing the state shall dispose of the property in the manner required by Article 59.06 of this code.

Added by Acts 1989, 71st Leg., 1st C.S., ch. 12, § 1, eff. Oct. 18, 1989. Subsec. (d) amended by Acts 1993, 73rd Leg., ch. 780, § 2, eff. Sept. 1, 1993.

**Art. 59.06. Disposition of forfeited property**

(a) Except as provided by Subsection (i), all forfeited property shall be administered by the attorney representing the state, acting as the agent of the state, in accordance with accepted accounting practices and with the provisions of any local agreement entered into between the attorney representing the state and law enforcement agencies. If a local agreement has not been executed, the property shall be sold on the 75th day after the date of the final judgment of forfeiture at public auction under the direction of the county sheriff, after notice of public auction as provided by law for other sheriff's sales. The proceeds of the sale

shall be distributed as follows:

(1) to any interest holder to the extent of the interest holder's nonforfeitable interest; and

(2) the balance, if any, after deductions of all storage and disposal costs, to be deposited not later than the 30th day after the date of the sale in the state treasury to the credit of the general revenue fund.

(b) If a local agreement exists between the attorney representing the state and law enforcement agencies, the attorney representing the state may transfer the property to law enforcement agencies to maintain, repair, use, and operate the property for official purposes if the property is free of any interest of an interest holder. The agency receiving the forfeited property may purchase the interest of any interest holder so that the property can be released for use by the agency. The agency receiving the forfeited property may maintain, repair, use, and operate the property with money appropriated for current operations. If the property is a motor vehicle subject to registration under the motor vehicle registration laws of this state, the agency receiving the forfeited vehicle is considered to

be the purchaser and the certificate of title shall issue to the agency. The agency at any time may transfer the property to a municipal or county law enforcement agency for the use of that agency.

(c) If a local agreement exists between the attorney representing the sate and law enforcement agencies, all money, securities, negotiable instruments, stocks or bonds, or things of value, or proceeds from the sale of those items, shall be deposited according to the terms of the agreement into one or more of the following funds:

(1) a special fund in the county treasury for the benefit of the office of the attorney representing the state, to be used by the attorney solely for the official purposes of his office;

(2) a special fund in the municipal treasury if distributed to a municipal law enforcement agency, to be used solely for law enforcement purposes, such as salaries and overtime pay for officers, officer training, specialized investigative equipment and supplies, and items used by officers in direct law enforcement duties;

(3) a special fund in the county treasury

if distributed to a county law enforcement agency, to be used solely for law enforcement purposes; or

(4) a special fund in the state law enforcement agency if distributed to a state law enforcement agency, to be used solely for law enforcement purposes.

(d) Proceeds awarded under this chapter to a law enforcement agency or to the attorney representing the state may be spent by the agency or the attorney after a budget for the expenditure of the proceeds has been submitted to the commissioners court or governing body of the municipality. The budget must be detailed and clearly list and define the categories of expenditures, but may not list details that would endanger the security of an investigation or prosecution. Expenditures are subject to audit provisions established under this article. A commissioners court or governing body of a municipality may not use the existence of an award to offset or decrease total salaries, expenses, and allowances that the agency or the attorney receives from the commissioners court or governing body at or after the time the proceeds are awarded. The head of the agency or attorney representing the state may not use the existence of an award to increase a salary, expense, or allowance for an employee of the

attorney or agency who is budgeted by the commissioners court or governing body unless the commissioners court or governing body first approves the expenditure.

(e) On the sale of contraband under this article, the appropriate state agency shall issue a certificate of title to the recipient if a certificate of title is required for the property by other law.

(f) A final judgment of forfeiture under this chapter perfects the title of the state to the property as of the date that the contraband was seized or the date the forfeiture action was filed, whichever occurred first, except that if the property forfeited is real property, the title is perfected as of the date a notice of lis pendens is filed on the property.

(g) All law enforcement agencies and attorneys representing the state who receive proceeds or property under this chapter shall account for the seizure, receipt, and disbursement of all such proceeds and property in an audit, which is to be performed annually by the commissioners court or governing body of a municipality, as appropriate. The audit shall be completed on a form provided by the Criminal Justice Division of the Governor's Office. Certified copies of the audit shall be delivered by the law

enforcement agency or attorney representing the sate to the Criminal Justice Division of the Governor's Office no later than 30 days after the audit is completed.

(h) As a specific exception to the requirement of Subdivisions (1)-(3) of Subsection (c) of this article that the funds described by those subdivisions be used only for the official purposes of the attorney representing the state or for law enforcement purposes, on agreement between the attorney representing the state or the head of a law enforcement agency and the governing body of a political subdivision, the attorney representing the state or the head of the law enforcement agency shall comply with the request of the governing body to deposit not more than a total of 10 percent of the gross amount credited to the attorney's or agency's fund into the treasury of the political subdivision. The governing body of the political subdivision shall, by ordinance, order, or resolution, use funds received under this subsection for:

(1) nonprofit programs for the prevention of dug abuse;

(2) nonprofit chemical dependency treatment facilities licensed under Chapter 464, health and Safety Code; or

(3) nonprofit drug and alcohol rehabilitation or prevention programs administered or staffed by professionals designated as qualified and credentialed by the texas Commission on Alcohol and Drug Abuse. The governing body of a political subdivision may not use funds received under this subchapter for programs or facilities listed under Subdivision (1)-(3) of this subsection if an officer of or member of the Board of Directors of the entity providing the program or facility is related to a member of the governing body, the attorney representing the sate, or the head of the law enforcement agency within the third degree by consanguinity or the second degree by affinity. As a specific exception to Subdivision (4) of Subsection (c) of this article, the director of a state law enforcement agency may use not more than 10 percent of the amount credited to the special fund of the agency under that subdivision for the prevention of drug abuse and the treatment of persons with drug-related problems.

(i) The attorney for the state shall transfer all forfeited property that is income from, or acquired with the income from, a movie, book, magazine article, tape recording, phonographic

record, radio or television presentation, or live entertainment in which a crime is reenacted to the attorney general. The attorney general shall deposit the money or proceeds from the sale of the property into an escrow account. The money in the account is available to satisfy a judgment against he person who committed the crime in favor of a victim of the crime if the judgment is for damages incurred by the victim caused by the commission of the crime. The attorney general shall transfer the money in the account that has not bee ordered paid to a victim in satisfaction of a judgment to the compensation to victims of crime fund on the fifth anniversary of the date the account was established. In this subsection, *"victim"* has the meaning assigned by Section 3, Crime Victims Compensation Act (Article 8309-1, Vernon's Texas Civil Statutes).

Added by Acts 1989, 71st leg., 1st C.S., ch. 12, § 1, eff. Oct. 18, 1989. Subsec. (c) amended by Acts 1991, 72nd Leg., ch. 312, § 2, eff. Sept. 1, 1991; Subsec. (h) added by Acts 1991, 72nd Leg., ch.312, § 1, eff. Sept. 1, 1991; Subsec. (a) amended by Acts 1993, 73rd Leg., ch. 780, § 3, eff. Sept. 1, 1993; Subsec. (g) amended by Acts 1993, 73rd Leg., ch. 814, § 1, eff. Aug. 30, 1993; Subsec. (i) added by Acts 1993, 73rd Leg., ch. 780, § 4, eff. Sept. 1, 1993.

**Art. 59.07. Immunity**

This chapter does not impose any additional liability on any authorized state, county, or municipal officer engaged int eh lawful performance of the officer's duties.

Added by Acts 1989, 71st Leg., 1st C.S., ch. 12, § 1, eff. Oct. 18,. 1989.

**Art. 59.08. Deposit of money pending disposition**

(a) If money that is contraband is seized, the attorney representing the sate may deposit the money in an interest-bearing bank account in the jurisdiction of the attorney representing the state until a final judgment is rendered concerning the contraband.

(b) If a final judgment is rendered concerning contraband, money that has been placed in an interest-bearing bank account under Subsection (a) of this article shall be distributed in the same manner as proceeds are distributed under Article 59.06 of this code, with any interest being distributed int he same manner and used for the same purpose as the principal.

Added by Acts 1989, 71st Leg., 1st C.S., ch. 12, § 1, eff. Oct. 18, 1989.

**Art. 59.09 Right to attorney not to be abridged**

This chapter is not intended to abridge an accused person's right to counsel in a criminal case.

Added by Acts 1989, 71st Leg., 1st C.S., §1, eff. Oct. 18, 1989.

**Art. 59.10 Election of laws**

If property is subject to forfeiture under this chapter and under any other law of this state, the attorney representing the state may bring forfeiture proceedings under either law.

Added by Acts 1989, 71st Leg., 1st C.S., ch,. 12, § 1, eff. Oct. 18, 1989.

**Art. 59.11 Report of seized and forfeited aircraft**

Not later than the 10th day after the last day of each quarter of the fiscal year, the

Department of Public Safety shall report to the State Aircraft Pooling Board:

(1) a description of each aircraft that the department has received by forfeiture under this chapter during the preceding quarter and the purposes for which the department intends to use the aircraft; and

(2) a description of each aircraft the department knows to have been seized under this chapter during the preceding quarter and the purposes for which the department would use the aircraft if it were forfeited to the department.

Added by Acts 1991, 72nd Leg., ch. 14, § 283, eff. Sept. 1, 1991.

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No. 94-392

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1994

*CURTIS RAY WARD*
Petitioner,
v.
*THE STATE OF TEXAS,*
Respondent.

On Petition for Writ of Certiorari
To the Texas Court of Appeals
For the First District

# RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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BEST AVAILABLE COPY

## QUESTIONS PRESENTED

I. Does assessment of a tax, pursuant to the Texas Controlled Substance Tax Act constitute punishment for fifth amendment Double Jeopardy Clause purposes?

II. Does assessment and partial payment of a $109,546.60 tax pursuant to the Texas Controlled Substances Tax Act bar any subsequent prosecution for possession of the marijuana that constituted the basis for imposition of the tex?

III. Does a civil forfeiture proceeding pursuant to Article 59 of the Texas Code of Criminal Procedure constitute punishment for fifth amendment Double Jeopardy clause purposes?

IV. Does a civil forfeiture judgment pursuant to Article 59 of the Texas Code of Criminal Procedure bar any subsequent porsecution for possession of the marijuana that constituted the basis for the imposition of the tax?

No. 94-392

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IN THE
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Petitioner,

v.

*THE STATE OF TEXAS,*

Respondent.

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On Petition for Writ of Certiorari
To the Texas Court of Appeals
For the First Judicial District

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**RESPONSE TO PETITION FOR WRIT OF CERTIORARI**

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES the State of Texas, Respondent herein, by and through the Attorney General of Texas, and files this Response to Petition for Writ of Certiorari.

## OPINION BELOW

The opinion of the court below is reported at 870 S.W.2d 659 (Tex. App. -- Houston [1st Dist.] 1994). A copy is attached to the petition as Exhibit E.

## JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

## RESPONSE TO PETITION FOR WRIT OF CERTIORARI

Respondent has reviewed the petition for writ of certiorari and agrees with Petitioner that the case should be remanded to the Court of Appeals for the First Judicial District of Texas for further consideration in light of *Department of Revenue of Montana v. Kurth Ranch,* 114 S.Ct. 1937 (1994). Because the lower court did not have the benefit of this Court's decision in *Kurth Ranch* when this case was decided, its opinion did not address the issues in a way that would facilitate proper resolution by this Court. The input of the state court on the application of *Kurth Ranch* to the facts involved in this case can assist the Court in its treatment of the issue should the case come before it again.

Respectfully submitted,

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